86-731

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually
and on behalf of all others
similarly situated,

APPELLANTS

v.

NEWTON JAMES, ET AL,

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Where provisions of a city charter provide for the method of electing its governing body, and a federal district court holds the method unconstitutional but does not implement charter provisions remedying the provisions held unconstitutional, does each subsequent de facto method of election implemented by the city remedying the unconstitutional provisions have to be submitted for proper scrutiny under Section 5 of the Voting Rights Act of 1965, as amended ?

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

LIST OF ALL PARTIES

FRANK MINGO, REV. HARRY BUIE, THEODORE BULLOCK, L. B. BUTLER, VELVERLINE JOHNSON, LAURA WILSON, and ROOSEVELT DAVIS, individually and on behalf of all others similarly situated,

APPELLANTS

v.

NEWTON JAMES, JEWELL D. CONERLY, JIM CAUSEY, HERBERT WILMESHERR, RONNIE WILKINSON, BEAKER GUNTER, JR., and QUARDINION LOCKLEY, MAYOR AND BOARD OF SELECTMEN FOR THE CITY OF McCOMB, MISSISSIPPI; CITY OF McCOMB, MISSISSIPPI; JIMMY HAFFEY, RUSSEL CASE, and HELEN BRUMFIELD, MEMBERS OF THE CITY OF McCOMB, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; THE CITY OF McCOMB, MISSISSIPPI MUNICIPAL DEMOCRATIC PARTY EXECUTIVE COMMITTEE; and THE CITY OF McCOMB, MISSISSIPPI MUNICIPAL REPUBLICAN PARTY EXECUTIVE COMMITTEE,

APPELLEES

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

FRANK MINGO, ET AL,
individually and on
behalf of all others
similarly situated,
Appellants

v.

NEWTON JAMES, ET AL,
Appellees

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

OPINION BELOW

The opinion of the three-judge district court for the Southern District of Mississippi which decided the instant case is unreported and is set out in Appendix "A".

JURISDICTION

This is an appeal from an interlocutory judgment of a three-judge District Court construing issues raised by the appellants involving Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c. The judgment of the three-judge District Court was entered on July 25, 1986. Appellants filed a timely notice of appeal in the United States District Court for the Southern District of Mississippi within 30 days of the entry of the interlocutory judgment, on August 18, 1986, and the notice of appeal is set out in Appendix "B". The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 2284 and 42 U.S.C. Section 1973c. This Court has jurisdiction of the appeal. NAACP v.

New York, 413 U.S. 345, 353-56 (1973); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. Section 1973c.

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or

effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure

has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the

provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title 1, Section 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, Sections 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, Sections 204, 206, Title IV, Section 405, Aug. 6, 1975, 89 Stat. 402, 405

STATEMENT OF THE CASE

Plaintiffs[1], black citizens and registered voters of the City of McComb, Mississippi, filed the instant lawsuit against the City, its governing body and election officials, on September 10, 1985, challenging the existing method of electing its governing body. The plaintiffs alleged that the City was created on

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[1]The named plaintiffs are Frank Mingo, Rev. Harry Buie, Theodore Bullock, L. B. Butler, Velverline Johnson, Laura Wilson, and Roosevelt Davis.

April 5, 1872 and granted a special charter under which to operate. Plaintiffs further alleged that Sections 2 and 3 of the special charter provided that the City was governed by a Mayor and six (6) member Board of Selectmen, all of whom were elected in citywide voting, thereby diluting and cancelling out black voting strength. The Complaint stated that according to the 1980 Census, the City of McComb had a total population of 12,331 persons of whom 7,862 or 63% were white and 4,469 or 36.24% were black, and a voting age population of 8,707 persons, of whom 6,020 or 69% were white and 2,687 or 30.86% were black. Plaintiffs alleged that the present method of electing the governing body of the City violated Section 2 of the Voting Rights Act.

Plaintiffs also alleged that the City

redistricted its three (3) ward lines on December 22, 1970 and provided a residency requirement for the three Selectmen elected from the three wards, but permitted at-large elections for the remaining three Selectmen. Plaintiffs alleged that the 1970 change in voting was never precleared and the City had held elections under the unprecleared redistricting plan. The Complaint alleged that these changes involved Section 5 of the Voting Rights Act of 1965, as amended, and requested the convening of a three-judge district court to consider plaintiffs' Section 5 issues.

On October 7, 1985, the defendants filed an Answer denying that plaintiffs were entitled to the convening of a three judge district court.

Then, on October 22, 1985, the City

passed an Ordinance changing the method of electing its governing body, the Board of Selectmen. The October 22, 1985 Ordinance provided that there would be five (5) Selectmen elected from single-member wards and one (1) Selectman elected by the voters of the City at-large.

On October 28, 1985, the plaintiffs formally filed a motion requesting the convening of a three-judge district court to hear their Section 5 issues.

The District Judge the case was assigned to held the convening of a three-judge district court in abeyance until after the United States Attorney General made a determination on the City's November submission.

On January 27, 1986, while the Attorney General was considering the City's

semi-ward plan, the plaintiffs filed a motion to amend their Complaint.

The District Court entered an Order on February 6, 1986 granting plaintiffs leave to file their Amended Complaint. The Amended Complaint was filed the same day.

The City of McComb is a special charter city. Under Mississippi law[2], special charter cities may amend their charters by following certain procedures. Those procedures provide that the Mayor and Board of Aldermen (Selectmen) must publish the intended charter changes in a local newspaper for three weeks, and thereafter submit the intended changes to the Governor for his approval, who

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[2]The Mississippi law pertaining to the amendment of charters for private charter cities is Section 88 of the Constitution of the State of Mississippi, and Sec. 21-17-9, Miss. Code Ann. (1972).

prior to approving the changes must submit the changes to the Attorney General of the State of Mississippi for his opinion that the changes do not violate State or federal law. However, after publication of the changes in the local newspaper, if ten percent (10%) of the voters of the city protest the changes and request an election on the changes, the Governor shall not approve the changes until after they have been submitted to and ratified by a majority of the voters of the city voting in a special election on the proposed changes.

Plaintiffs alleged in their Amended Complaint and at argument before the three-judge panel convened to hear the case that the City of McComb did not follow this procedure in amending its

Charter on October 22, 1985. Rather, plaintiffs alleged, the City, by ordinance, amended Sections 2 and 3 of the Charter, and in November, 1985 submitted its 5 & 1 semi-ward plan to the United States Attorney General for preclearance. Plaintiffs alleged in their Amended Complaint, in their Motion for Summary Judgment on their Section 5 issues, and at argument before the three-judge panel that the change in voting which occurred on October 22, 1985, the abrogation of the notice and referendum requirement in amending city charters, was never submitted for proper Section 5 scrutiny.

A three-judge District Court was convened on July 21, 1986 to hear plaintiffs' Section 5 issues. Prior to the hearing before the three-judge court,

the parties stipulated that the City had operated under its special charter from 1872 until 1930, when it abandoned its special charter for the Commission form of government. The parties further stipulated that on September 24, 1946, the city voters, in a special election, abandoned the Commission form of government and returned to the special charter form of government. The Stipulation further provided that when the City returned to its special charter form of government, the City's charter provided that there were to be six (6) selectmen, three elected from single-member wards, and the remaining three selectmen elected from the City at-large. The Court found that from 1947 until 1962, the City of McComb was divided

into three single-member wards for the election of three selectmen, with the remaining three selectmen being elected at-large.

In 1962, Mississippi enacted Section 21-3-7 of the Mississippi Code Annotated of 1972, as amended, applicable to code charter cities. Although McComb was not a code charter city, it decided to amend its charter on the authority of Section 21-3-7 of the Mississippi Code. Thus, in August, 1962, the mayor and board of selectmen, following proper statutory procedures for charter amendments[3], amended McComb's private charter to provide for at-large election of all

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[3]The proper statutory procedures for charter amendments was to give notice and an opportunity for a referendum on the charter amendments as provided in the Mississippi Constitution and Section 21-17-9, Miss. Code Ann. (1972).

six (6) selectmen.

In 1975, a three-judge district court held in Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) that Section 21-3-7 of the Mississippi Code Annotated of 1972, as amended violated the Fourteenth and Fifteenth Amendments to the United States Constitution. The Stewart decision had the effect of reinstating "every law of the State of Mississippi governing the election of municipal officials which was repealed by Section 21-3-7." Stewart not only held Section 21-3-7 to be unconstitutional, but also enjoined at-large elections pursuant to its terms in any municipality. The Stewart Court declared pre-1962 city voting procedures to be in effect. The

Stewart Court, however, did not fashion the semi-ward (three single-member ward, three at-large) districting plan reverted to by the City, nor did the Court review the semi-ward plan actually implemented by the City in response to the Court's holding the at-large method of election unconstitutional.

In response to the Stewart decision, the City reverted to the three single-member ward, three at-large election system it had used from 1947 until 1962. This change was not submitted for Section 5 preclearance, and was in effect from 1976 until 1985.

Plaintiffs, in their motion for summary judgment filed June 30, 1986, and before the three-judge panel argued that the City's action in reverting from an at-large method of election to a semi-ward method of election (having three selectmen elected from

single-member wards and three selectmen elected at-large) was a de facto change in the City's charter.[4] Plaintiffs argued that this de facto charter change had never been precleared.

And, the plaintiffs argued, before the three-judge panel, that the October 22, 1986 Ordinance changing the method of election from a semi-ward method (three & three method) of election to a five single-member and one at-large method of election was a de facto change

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[4]Plaintiffs argued that the change in the method of election from at-large to semi-ward was a de facto ward change because the City did not formally amend its charter. Rather, the City implemented the semi-ward method of election without following the dictates of Section 88 of the Mississippi Constitution and Section 21-17-9, Miss. Code Ann. (1972).

in the City's charter.[5]

The three-judge panel ruled on July 25, 1986 that the city charter was not amended, de jure or de facto, by the defendants' actions on October 22, 1985. The Court held, therefore, that there was no "change" in procedure by effecting the 1985 changes by means of ordinance rather than by means of charter. Thus, the Court ruled that there was no

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[5]Plaintiffs argued that the change in the method of election from a three single-member ward and three at-large system to a five single-member ward and one at-large system was a de facto change in voting because the defendants took no action formally amending their Charter. Plaintiffs urged that the 1976 de facto charter change provided that three selectmen had to be elected at-large. When the City reducted the at-large number of selectmen from three to one, it changed the method of electing the selectmen, thereby amending the charter. In order for the charter to have been amended, the City should have given notice and a chance for a petition and referendum by the voters.

change in a voting procedure subject to Section 5 of the Voting Rights Act.

THE QUESTION IS SUBSTANTIAL

The question presented on this appeal is substantial because it raises issues concerning the scope and proper interpretation of this Court's ruling in three important cases in this area, McDaniel v. Sanchez, 452 U. S. 130 (1981); McCain v. Lybrand, ___ U.S. ___, 104 S. Ct. 1037 (1984); and N.A.A.C.P. v. Hampton County Election Commission, ___ U. S. ___, 105 S. Ct. 1128 (1985). Additionally, the question presented raises the issue in this Court for the first time since Allen v. State Board of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); and Dougherty County, Georgia Board of Education v.

White, 439 U.S. 32 (1978) as to what constitutes a change in a voting standard, practice or procedure.

Plaintiffs raised, and the three-judge panel did not rule, on the issue of whether or not the plan reverted to by the City after the Stewart Court had declared the at-large method of election unconstitutional was a de facto change in "procedure." The three-judge panel did not answer the question of when a federal district court court holds a voting standard unconstitutional but does not implement a standard remedying the unconstitutional standard, does any subsequent "change in procedure or practice in adopting a new standard" implemented by the State or political subdivision have to be submitted for Section 5 scrutiny in order to be valid?

This Court has held that when a fed-

eral district court holds a voting standard unconstitutional, any new standard adopted or implemented by the State or political subdivision which was not fashioned by the federal district court must be precleared. McDaniel v. Sanchez, 452 U.S. 130, 148-149 (1981). The Court specifically stated:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review.
> ...
> The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in Connor v. Johnson, 402 U.S. 690, 91 S. Ct. 1760, 29 L. Ed. 2d 268 (1971). Even in these cases, however, if the governmental body

> subsequently adopts a plan patterned after the court's plan, Section 5 review would be required, Connor v. Waller, supra.

McDaniel v. Sanchez, 452 U.S. at 148-149.

However, this Court has not answered the question of when a federal district court holds a voting standard unconstitutional, does any "change in procedure in adopting a new voting standard" implemented by the State or political subdivision have to be precleared, even where the new voting standard is ultimately precleared?[6]

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[6]Plaintiffs are aware that the three-judge district court ruled that there had not been a "change in procedure" by the City of McComb in adopting its new voting standard. However, plaintiffs respectfully submit that this holding by the Court is clearly erroneous under the principles announced by this Court in Anderson v. City of Bessemer City, ___ U.S.___, 105 S. Ct. 1504 (1985).

This question is so substantial as to require plenary consideration by this Court because the answer to this question would give direction to voting rights litigants, covered jurisdictions, and the courts as to if, or when, preclearance is required when a covered jurisdiction changes the procedure it uses to adopt a new voting standard, even in situations where the adopted voting standard is eventually precleared. For example, if a covered State's constitution provide for the manner of electing legislators, and the State constitution can be amended only by referendum, if the State legislature amends the manner of electing legislators and submit the statute to the United States Attorney General for preclearance, and the Attorney General preclears the statute, can voting

rights litigants bring a Section 5 challenge to the change in procedure implemented by the State in changing the method of electing its legislators?[7]

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[7]Plaintiffs are aware that the three-judge panel in the instant case did not reach this question because the panel ruled that there had been no change in procedure. However, plaintiffs submit that the panel's finding of fact on this issue is clearly erroneous under the principles of Anderson v. City of Bessemer City, supra. First, plaintiffs argued, in their motion for summary judgment filed on June 30, 1986, that:

> the actions of city officials for the City of McComb, Mississippi in conducting elections for members of the Board of Selectmen in 1976 and in subsequent years in compliance with the dictum contained in Stewart v. Waller, supra, was a de facto amendment of the City's charter regarding the method of election for that Board, and thus was a change in voting subject to scrutiny under Section 5...

Second, plaintiffs argued, in their motion for summary judgment filed on June 30, 1986 that the October 22, 1985 ordinance was a charter change from the 1976 change subject to Section 5 scrutiny.

The Court's resolution of the question presented would give direction to all of the jurisdictions covered by Section 5 as to the proper application of this Court's prior rulings in McCain v. Lybrand, supra, McDaniel v. Sanchez, supra, and N.A.A.C.P. v. Hampton County Election Commission, supra.[8] The Court's resolu-

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[8]Plaintiffs submit that the answer to the question presented would be beneficial to covered jurisdictions as well as the courts and litigants. Plaintiffs in the instant case argued, in oral argument and in their motion for summary judgment, that the actions of the City in reverting to its three and three system of election in 1976 in response to Stewart v. Waller, supra, was a de facto voting change, i. e. charter amendment. County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (D.D.C. 1983)(three-judge court). Plaintiffs also argued that the October 22, 1985 ordinance changing the method of election from three single-member districts and three at-large to five single-member districts and one at-large, without formally amending the charter, was a de facto voting change, i. e. charter amendment, of the 1976 charter amendment. The three-judge panel did not adress these arguments.

tion of this question would be extremely beneficial to the State of Mississippi, where there are 24 private charter cities. Stewart v. Waller, 404 F. Supp. at 212, n. 9. The answer to the question presented could curtail litigation in this area.

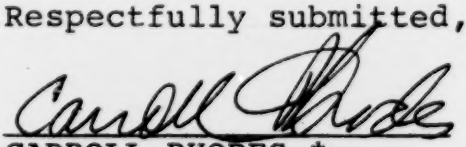
THE COURT ABUSED ITS DISCRETION IN DENYING A PRELIMINARY INJUNCTION

The three-judge panel abused its discretion in denying a preliminary injunction in this case because the Court should have found that the voting changes challenged were covered by Section 5 of the Voting Rights Act of 1965, and the changes had not been precleared. Perkins v. Matthews, 400 U.S. 379 (1971).

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction, reverse the action of the district court denying plaintiffs request for declaratory and injunctive relief, and render a decision in this case, or in the alternative, remand the case to the district court with instructions to consider all of the changes in voting challenged by the plaintiffs.

Respectfully submitted,



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APPENDICES

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRANK MINGO, et al PLAINTIFFS

vs. Civil Action No. J85-0848(L)

NEWTON JAMES, et al DEFENDANTS

ORDER

This cause having come on for hearing on July 21, 1986, before a three-judge district court duly convened pursuant to the plaintiffs' request, and the court having considered the pleadings and exhibits offered by the parties, having heard and considered the arguments of counsel, and being fully advised in the premises, finds:

1. This action brought under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c, is required to be heard by a district court of three

judges, pursuant to 28 U.S.C. Section 2284.

2. The defendant City of McComb is a jurisdiction covered by the special provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973c.

3. The plaintiffs seek to enjoin the City of McComb from implementing a new system of government providing for the election of five selectmen from single-member districts and one selectman to be elected at large (five/one system). They contend that although the five/one system itself has been precleared by the United States Attorney General in compliance with the requirements of Section 5, the system was effected by a new procedure, which procedure constitutes a change in voting procedure that has not been precleared in satisfaction of the requirements of

Section 5. This alleged change is based on the fact that the five/one system was effected through the enactment of a city ordinance instead of by the established procedure of formal amendment of the city charter.

4. Under the special or private charter form of government, McComb is governed by a mayor and a six-member board of selectmen. From 1947 until 1962, the City of McComb was divided into three, single-member wards for the election of three selectmen (three/three system). The selectmen for the wards were required to live in the ward that they represented, and were elected only by voters residing in such wards. The remaining three selectmen were elected at large by the voters of the City of McComb.

5. In 1962, Mississippi enacted Miss. Code Ann. Sec. 21-3-7, applicable to code charter municipalities. Although McComb is not a code charter city, it decided to amend its charter on the authority of section 21-3-7. Thus, in August 1962, the mayor and board of selectmen, following proper statutory procedures for charter amendment, amended McComb's private charter to provide inter alia, that "all said candidates for selectmen for wards and at large shall be voted on by all of the electors of said city voting in such election."

6. In 1975 a three-judge district court held in Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975), that Miss. Code Ann. Sec. 21-3-7 (1972) violated the fourteenth and fifteenth amendments. Stewart had the effect of reinstating

"every law of the State of Mississippi governing the election of municipal officials which was repealed by Section 21-3-7." Stewart not only held section 21-3-7 to be unconstitutional, but also enjoined at-large elections pursuant to its terms in any municipality. Stewart declared pre-1962 city voting procedures to be in effect. In response to Stewart, McComb reverted to the three/three system used from 1947 to 1962. This change was not submitted for Section 5 preclearance, and was in effect from 1976 to 1985.

7. On October 22, 1985, the mayor and board of selectmen of McComb provided by ordinance that there shall be five selectmen elected from wards with only those voters living in the respective wards voting for the selectmen from their wards, and one selectman to be elected by the voters of the city at

large. This ordinance, increasing the number of single-member wards from three to five, and the districting plan dividing McComb into five wards, were both submitted to the attorney general for preclearance. By letter dated April 21, 1986, the attorney general, addressing the validity of the McComb ordinance, did not object to the change to five single-member districts with one at-large position.

8. The plaintiffs acknowledge that the change effected by the October 1985 ordinance has been properly precleared in satisfaction of the requirements of Section 5. They contend, however, that the change that was not precleared was the procedure used to implement the five/one system, that is, by enactment of an ordinance instead of by amendment of the charter. The plain-

tiffs argue that the city charter does not provide authority to implement a five/one system, and that the established procedure for effecting this system is by charter amendment; that the statutes of Mississippi provide that in amending a city charter, the city electorate is allowed to vote on a proposed charter amendment if ten percent of the electorate protests the amendment; that here, the City of McComb, by changing the procedure from "amendment" to "ordinance," denied the electorate the opportunity to vote on whether to institute a new system of aldermanic government. This alleged change in the procedure of effecting a new system therefore was a change in voting, the plaintiffs argue, within the meaning of Section 5 of the Voting Rights Act, but which has not been sub-

mitted for preclearance in satisfaction of the requirements of Section 5.

Whether using "ordinance procedure" instead of "amendment procedure" constitutes a change in established procedure depends on whether the effecting of the five/one system by ordinance is permitted under the provisions of the charter without amendment. To answer this question, we first must determine what provisions of the McComb city charter were in effect when the ordinance was enacted in October 1985.

9. The 1962 amended McComb city charter provided:

> The board of mayor and selectmen of the City of McComb, Pike County, Mississippi, shall have authority by ordinance to divide said city into not less than three wards; that one selectman shall be elected from each ward and the remaining number of selectmen shall be elected from the city at-large; that the total number of selectmen

> of said city shall be six; that all candidates for selectmen from wards shall reside in said ward; that all candidates shall qualify for either selectman at-large or selectman for ward; and all said candidates for selectmen for wards and at large shall be voted on by all of the electors of said city voting in such election.

There have been no subsequent amendments to the city charter.

10. We hold that except for the clause "and all said candidates for selectmen for wards and at-large shall be voted on by all of the electors of said city voting in such election," which is void under the authority of Stewart, the 1962 McComb city charter was in full force and effect in October 1985.

11. The city charter was not amended, de jure or de facto, by the defendants' actions in October 1985. The McComb city charter in effect in October

1985 provides authority for the defendants to enact and implement an ordinance changing the system of electing the members of the board of selectmen for a three/three system to a five/one system. There was no "change" in procedure by effecting the 1985 changes by means of ordinance rather than by means of charter, and therefore there was no change in a voting procedure subject to Section 5 of the Voting Rights Act.

12. The ordinance changing the system of electing the members of the board of selectmen from a three/three system to a five/one system has been submitted to and precleared by the United States Attorney General in satisfaction of the requirements of Section 5. The plaintiffs' complaint and other pleadings do not show that

the defendants have effected any other change in a standard, practice, or procedure with respect to voting that is subject to the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

IT IS THEREFORE

ORDERED that the plaintiffs' motion for summary judgment and for declaratory judgment are denied. It is further

ORDERED that the plaintiffs' request for a temporary restraining order and preliminary and permanent injunctive relief is denied. It is further

ORDERED that the defendants' motion for summary judgment on all Section 5 issues is GRANTED. It is further

ORDERED that, having addressed all

the Section 5 claims before us, this three-judge court is hereby dissolved.

ORDERED this the 25th day of July, 1986.

/s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRANK MINGO, et al PLAINTIFFS

vs. Civil Action No. J85-0848(L)

NEWTON JAMES, et al DEFENDANTS.

JUDGMENT

This cause having come on for hearing on July 21, 1986, before a three-judge district court duly convened under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, pursuant to the plaintiffs' request, and the court having considered the pleadings and exhibits offered by the parties, having heard and considered the arguments of counsel, and being fully advised in the premises, and the court having issued its order giving reasons for this

judgment, it is hereby ordered that the plaintiffs' motion for summary judgment and for declaratory judgment are denied. It is further ordered that the plaintiffs' request for a temporary restraining order and preliminary and permanent injunctive relief is denied. It is further ordered that the defendants' motion for summary judgment on all Section 5 issues is granted. It is further ordered that, having addressed all the Section 5 claims before us, this three-judge court is hereby dissolved.

ORDERED AND ADJUDGED this the 25th day of July, 1986.

/s/ E. Grady Jolly
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRANK MINGO, REV. HARRY BUIE, THEODORE BULLOCK, L. B. BUTLER, VELVERLINE JOHNSON, LAURA WILSON, and ROOSEVELT DAVIS, individually and on behalf of all others similarly situated — PLAINTIFFS

VS. CIVIL ACTION NUMBER J85-0848(L)

NEWTON JAMES, JEWELL D. CONERLY, JIM CAUSEY, HERBERT WILMESHEER, RONNIE WILKINSON, BEAKER GUNTER, JR., and QUARDINIDN LOCKLEY, MAYOR AND BOARD OF SELECTMEN FOR THE CITY OF McCOMB, MISSISSIPPI; CITY OF McCOMB, MISSISSIPPI: JIMMY HAFFEY, RUSSEL CASE, and HELEN BRUMFIELD, MEMBERS OF THE CITY OF McCOMB, MISSISSIPPI BOARD OF ELECTION COMMISSIONERS; THE CITY OF McCOMB, MISSISSIPPI MUNICIPAL DEMOCRATIC PARTY EXECUTIVE COMMITTEE; and THE CITY OF McCOMB, MISSISSIPPI MUNICIPAL REPUBLICAN PARTY EXECUTIVE COMMITTEE — DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that plain-

tiffs, above named, hereby appeal to the Supreme Court of the United States from the final Order and Judgment entered in this action on July 25, 1986, by a district court of three judges, convened pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c, denying plaintiffs' motion for summary judgment and for declaratory judgment and request for a temporary restraining order and preliminary and permanent injunction and granting the defendants' motion for summary judgment on all Section 5 issues, and dissolving the three-judge court.

This appeal is taken pursuant to

28 U.S.C. Sections 1253 and 2284 and

42 U.S.C. Section 1973c.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, one of the attorneys for the plaintiffs, hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Notice of Appeal to Billy B. Bowman, Brewer, Deaton & Bowman, Post Office Drawer B, Greenwood, MS 38930, attorney for the defendants.

This the 18th day of August, 1986.

/s/Carroll Rhodes
CARROLL RHODES

(2)

Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-731

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually and on behalf of all others similarly situated,
Appellants,

VERSUS

NEWTON JAMES, ET AL,
Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the holding of the District Court that there was no change, de facto or de jure, in procedure subject to review under Section 5 of the Voting Rights Act[1] by the municipal governing body's effecting changes[2] in the manner of electing the municipal governing body by means of a municipal ordinance rather than a charter amendment is clearly - erroneous under F. R. Civ. P. 52 (a).

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[1] 42 USC §1973c (1976)

[2] The ordinances implementing the election changes was precleared by the Attorney General under the provision of Section 5 of the Voting Rights Act, 42 USC §1973(c).

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually
and on behalf of all others similarly situated,
APPELLANTS

V.

NEWTON JAMES, ET AL.,
APPELLEES

ON APPEAL FROM A THREE-JUDGE
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, Appellees move that the judgment of the three-judge court of United States District Court for the Southern District of Mississippi be affirmed on the ground that the judgment is plainly correct and the challange to it so insubstantial as to warrant no further argument.

STATEMENT OF THE CASE

Appellants' statement of the case (Jur. St. p 6-19) fails to include many material, relevant facts relied upon by the three-judge panel of the District Court and down plays others; thus a complete statement of the relevant facts before the lower court is appropriate.

The City of McComb City, Mississippi, operates under the provisions of a special charter granted by the Mississippi Legislature in 1872.

The provisions of the charter which concern the manner in which the Board of Selectmen are to be elected were amended in 1908[1] and in 1962. The lower court found that the charter provision in effect on October 25, 1985, (Jur. St. App. 8a to 9a) had been adopted by charter amendment in 1962 and provided:

> "The Board of Mayor and Selectmen of the City of McComb City, Pike County, Mississippi, shall have authority by ordinance to divide said city into not less than three wards; that one Selectman shall be elected from each Ward and the remaining number of selectmen shall be elected from the city at-large; That the total number of selectmen of said City shall be six; That all candidates for selectmen from wards shall reside within said wards; That all candidates shall qualify for either selectmen at-large or selectman for Ward; *And all said candidates for selectman for wards and at large shall be voted on by all of the electors of said city voting in such election.*"

The lower court held that the portion of the charter amendment *underlined* above which required the at-large

---

[1] The charter as amended in 1908 read: "The board of Mayor and Selectmen of the City of McComb City, Pike County, Mississippi, shall have the authority by Ordinance to divide the said City into not less than three wards and to provide for the election of one selectman from each ward and the remaining number of selectmen from the City at-large."

election of all selectmen was void under the authority of *Stewart v. Waller,* 404 F. Supp. 206 (N.D. Miss. 1975). (Jur. St. App. 9a.)

On October 22, 1985, the Mayor and Board of Selectmen adopted a municipal ordinance increasing the number of selectmen elected from wards to five and delineating ward boundaries. This ordinance, in accordance with Sec. 21-13-1, et, seq, Miss. Code Ann. (1972) was published one time on October 25, 1985 in *The McComb Enterprise-Journal.*

After the compliance with all steps required for the enactment of a municipal ordinance under state law,[2] the ordinance was submitted on November 19, 1985 to the Attorney General of the United States for preclearance in accordance with Section 5 of the Voting Rights Act of 1965, as amended. 42 USC 1973 (c)

By letter dated January 21, 1986, the Attorney General made the following comment and request for additional information:

> "We also note that Section 21-17-9 of the Mississippi Code of 1972 appears to require that when a municipality amends its charter, the amendment must be published in a local newspaper for three weeks, and then submitted to the Governor and the State Attorney General for approval. According to information we have received, this may not have occurred with respect

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[2] Section 21-13-11 Miss. Code Ann. (1972)

> to the instant proposed charter change. Please provide evidence of compliance with the statute or evidence of the City's authority from the State to avoid this provision."[3]

On March 31, 1986, in response to the request for evidence of the city's authority, the Attorney General was sent copies of two official State of Mississippi Attorney General's Opinions dated March 28, 1986, which specifically addressed this issue. In these official opinions the Attorney General for the State of Mississippi stated that the private charter of the City of McComb gave the Mayor and Board of Selectmen the authority to increase the number of selectmen elected from wards by ordinance rather than by charter amendment.[4]

The Attorney General of the United States by letter dated April 21, 1986 did not interpose an objection to the change in the manner of electing the municipal governing body from three at-large positions to five single-member districts with one at large position, the districting plan; and the July 3, 1985, annexation of two tracts of land to the City of McComb, in Pike County, Mississippi.

---

[3] Letter dated January 21, 1986, from Gerald W. Jones, Chief, Voting Section, Civil Rights Division, to Thomas H. Walman, City Attorney, McComb, Mississippi, introducted into evidence in the lower court as Exhibit "G-11".

[4] Official Attorney General's Opinions dated March 28, 1986, addressed to Honorable Quordiniah N. Lockley, Selectman, Ward III, McComb, Mississippi, and Honorable Billy B. Bowman, Attorney for the City of McComb, Mississippi, introduced into evidence in the lower court as Exhibit "G-12".

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS NO "CHANGE" IN PROCEDURE BY EFFECTING THE 1985 CHANGES BY MEANS OF ORDINANCE RATHER THAN BY MEANS OF A CHARTER AMENDMENT.

A. *CHARTER AUTHORIZED CHANGE BY ORDINANCE*

Initially, it must be noted that the Section 5 claim advanced by Appellants is not the ordinance adopted in October 1985 and precieared by the Department of Justice, but a claim that the ordinance adopted in October 1985 amended de facto the private charter. (Jur. St. 16-18.)

The fallacy of the Appellants' claim lies in their failure to accept the effect of the decision in *Stewart v. Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) on the McComb private charter.

It is undisputed that in 1962 the City of McComb amended its private charter under the authority of the recently revised Section 21-3-7 of the Mississippi Code Annotated (1972) to provide that all selectmen, whether from wards or at-large, would be elected from the City at-large. (Jur. St. pp 14-15.) It is also undisputed that the Court in *Stewart v. Waller,* supra, declared Section 21-3-7 as amended by the legislature in 1962 unconstitutional. The Court in *Stewart* held void and unenforceable all local ordinances or charter amendments of any Mississippi municipality, including McComb, which required at-large elections adopted

in reliance on Section 21-3-7. 404 F.Supp. at 220.

This action of the *Stewart* court had the effect of declaring void and unenforceable the portion of the McComb City Charter adopted in 1962 which required "And all said candidates for selectmen for wards and at-large shall be voted on by all of the electors of said City voting in such election."(Jur. St. App. 9a)

Thus, in all elections conducted by the City of McComb from 1976 to October 1985 the unconstitutional portion of the charter was not followed and, as provided in the remaining constitutional portions of the charter, three selectmen were elected from wards and three selectmen were elected from the City at-large.[5]

The City of McComb was not required, as alleged by Appellants, to amend its charter in order to remove this unconstitutional provision. It is not necessary for a governmental body to pass legislation removing from its statute books laws which are declared unconstitutional by a court of competent jurisdiction.

---

[5] The plaintiffs argue this change required by the *Stewart* court as another "de facto" change in the City's Charter that has not been precleared. (Jur. St. 17-18) The following by the City of McComb of a constitutional decision of a Court of the United States does not require Section 5 preclearance. *Conner v. Johnson*. 402 U.S. 690 (1971), *McDaniel v. Sanchez*, 452 U.S. 130 (1981). Section 51.16 - Court-ordered changes. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended. 28 C.F.R. § 51.16. In any event, the adoption of a valid ordinance in 1985 which was precleared makes this issue now moot. *City of Dallas v. United States*, 482 F. Supp. 183 (U.S.D.C.D.C., 1980) (three-judge court).

This Court in 1886 in *Norton v. Shelby County*, 118 U.S. 425, made the following comment of the effect of an unconstitutional act:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed."

Similar statements as to the legal effect of an unconstitutional act are found in *Chicago, Illinois &Railway Company v. Hackett*, 228 U.S. 559 (1913); *Fay v. Novia*, 372 U.S. 391 (1963).

A situation similar to the instant matter concerning the effect of a part of a private charter being declared unconstitutional was discussed by this Court in *Wise v. Lipscomb*, 437 U.S. 533 (1978).

> "It is suggested that the city was without power to enact the ordinance because the at-large system declared unconstitutional was established by the City Charter and because, under the Texas Constitution, Art. XI, §5, and Texas statutory law ... the Charter can not be amended without a vote of the people. But the District Court was of a different view. Although the Council itself had no power to change the at-large system as long as the charter provision remained intact, once the charter provision was declared unconstitutional, and, in effect null and void, the Council was free to exercise its legislative powers which it did by enacting the eight/three plan.
> 437 U.S. at 544

Since the all at-large features of the McComb Private Charter had been declared unconstitutional, and thus void and unenforceable, there was no need for the Mayor and Board of Selectmen to amend the charter to increase to five the number of single member wards. The charter clearly provides that the Mayor and Board of Selectmen have the authority by ordinance to divide said City into not less than three wards. Because the charter specifically provided that the number of selectmen, if greater than three, could be established by ordinance, there was no need to amend the charter.

B. THE DISTRICT COURT'S FINDING OF NO CHANGE IS NOT CLEARLY ERRONEOUS

The District Court made the following findings in Paragraph II:

> "The city charter was not amended, de jure or de facto, by the defendants actions in October 1985. The McComb city charter in effect in October 1985 provides authority for the defendnats to enact and implement an ordinance changing the system of electing the members of the board of selectmen [sic] a three/three system to a five/one system. There was no "change" in procedure by effecting the 1985 changes by means of ordinance rather than by means of charter, and therefore there was no change in a voting procedure subject to Section 5 of the Voting Rights Act."
>
> (Jur. St. App. 9a - 10a)

The Appellees submit that this finding is reviewable under the clearly-erroneous test of F. R. Civ. P. 52(a). The Rule 52(a) standard applies even if the findings, as in the instant case, are not based upon credibility determinations, but are based soley on documentary evidence. *Anderson v. Bessemer City,* 470 U.S. _____, 106 S. Ct. _____, (1985). Rule 52 broadly requires that findings not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. It does not divide facts into categories; in particular, it does not divide findings or facts into those that deal with "ultimate" and those that deal with "subsidiary" facts. *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982); *Rogers v. Lodge,* 458 U.S. 613, 622-623. (1982).

The Rule 52(a) clearly-erroneous standard for review has consistently been applied by this Court in reviewing lower court decisions involving claims of vote dilution arising under the Fourteenth and Fifteenth Amendments and claims arising under the Voting Rights Act. *White v. Regester,* 412 U.S. 755 (1973); *City of Rome v. United States,* 458 U.S. 156 (1980); *Rogers v. Lodge,* supra; *Thornburg v. Gingles,* _____ U.S._____(1986).

THE MANNER OF ADOPTING THE FIVE WARD PLAN BY ORDINANCE WAS PRECLEARED

In the alternative, the Appellees respectfully submit that the manner of adopting the five ward plan by ordinance rather than by a charter amendment was precleared under the provisions of Section 5 of the Voting

Rights Act.[6] By letter dated January 21, 1986, the Attorney General reviewed the statutory requirements for amending a private charter and requested compliance by the City of McComb with the statute or "evidence of the City's authority from the state to avoid this provision."[7]

In response to this request the Attorney General was furnished with copies of two official State of Mississippi Attorney General's Opinions, both dated March 28, 1986. In these opinions the Attorney General for the State of Mississippi stated that the private charter of the City of McComb gave the Mayor and Board of Selectmen the authority to increase the number of selectmen elected from wards by ordinance rather than by charter amendment."[8]

The ordinance increasing the number of selectmen elected from wards to five with one at-large and the districting plan were precleared by the Attorney General of the United States by letter dated April 21, 1986.[9] The Attorney General never objected to the use of an ordinance by the City of McComb to increase the number of selectmen elected from wards.

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[6] Although the Appellees' submission to the Attorney General was admitted into evidence before the District Court, the District Court did not find it necessary to decide this issue in reaching its decision.

[7] Statement of Case, page 3,4, supra.

[8] Statement of Case, page 4, supra.

[9] Statement of Case, page 4, supra.

Under the provisions of Section 5, a covered jurisdiction may enforce a change submitted for preclearance if the Attorney General has not interprosed an objection within sixty (60) days of submission. *Morris v. Gressette,* 432 U.S. 491 (1977).

The Appellees have never conceded that their actions constituted a change, de facto or de jure in the private charter. However, the authority of the Mayor and Board of Selectmen to make the change by ordinance was raised independently by the Attorney General. It was subsequently answered by the City and obviously evaluated by the Attorney General prior to his issuing the preclearance letter.

The Appellees deny that a change in the City's charter requiring Section 5 submission has occurred and concede that the manner, i.e. by ordinance, utilizied by the City of McComb in increasing the number of selectmen elected from wards was never specifically submitted for preclearance. However, the authority of the Mayor and Board of Selectmen to make this change by ordinance was submitted to the Attorney General for his consideration in an unambiguous, recordable manner with a request for his consideration pursuant to the Act. *McCain v. Lybrand,* _____U.S. _____, 404 S. Ct. 1037,(1984). The failure of the Attorney General to specifically object within sixty (60) days to the procedure by which the City of McComb increased its number of selectmen elected from wards to five by ordinance rather than a charter amendment constitutes preclearance under the provisions of the Act.

THE QUESTION PRESENTED BY APPELLANTS IS NOT SUBSTANTIAL

This case, contrary to the allegations of the

Appellants, does not raise as issues requiring this Court's consideration any new or novel issues delineating what "constitutes a change in a voting standard, practice or procedure", (Jur. St. 20), or an explanation of this Court's prior rulings in Section 5 cases (Jur. St. 25), nor is the question regarding submission under Section 5 of "subsequent de facto changes" present. (Jur. St. i). As presented to the lower court and preserved by this appeal, this case involves a determination of two issues:

a) the effect of the constitutional decision of *Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) on the private charter of the City of McComb, Mississippi; and

b) whether the private charter of the City of McComb City, Mississippi, in effect on October 22, 1985, authorized the Mayor and Board of Selectmen to establish additional wards by adoption of a municipal ordinance.

The hypothetical question raised by the Appellants on page 23 of their Jurisdictional Statement is precluded from being precleared by regulations adopted by the Department of Justice for the administration of Section 5 of the Voting Rights Act. 28 C.F.R. §51 et seq. Each submission is required to contain, in addition to other information, the following:

§51.25 Required contents

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.
28 C.F.R. § 51.25.

However, if, as presented in the Appellants' hypothetical, any such legislation which was not authorized or in accordance with a city's charter or a state's constitution was precleared, the matter is one of state law and the aggrieved party would have an appropriate state forum within which to litigate this matter.

CONCLUSION

Appellants present no substantial question for decision by this Court. The judgment of the three-judge panel of the United States District Court for the Southern District of Mississippi is correct and should therefore be affirmed.

Dated: November 24, 1986.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-731

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually and on behalf of all others similarly situated,

APPELLANTS

VERSUS

NEWTON JAMES, ET AL.,

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OPPOSING MOTION TO AFFIRM

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually and on behalf of all others similarly situated,

APPELLANTS

VERSUS

NEWTON JAMES, ET AL.,

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OPPOSING MOTION TO AFFIRM

The appellees, in their Motion to Affirm, indicate that the McComb City Charter was amended only in 1908 and 1962. (Motion to Affirm, p. 2). However, the appellees over-

look several important facts contained in the record.[1] The appellees failed

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[1]The parties entered into a Stipulation of Facts prior to trial which is contained in the record. Stipulation of Facts 9 and 10 provide as follows:

> 9. That when the City of McComb, Mississippi returned to its special charter form of government on the first Monday of January, 1947, the City's charter provided that there shall be six selectmen, three elected from the City by the voters voting in an election at-large and three selectmen elected from wards, and the three selectmen elected from wards must reside in the wards from which they are elected.
>
> 10. (Provided same as Stipulation 9, adding that the City was divided into three wards from 1947 until 1962.

Stipulation 15 provided that after the Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975)(three-judge court) decision, the City returned to the method of electing selectmen used from 1947 until 1962.

to list the fact that the City of McComb's charter provided in 1947 that there shall be six selectmen, with three selectmen elected at-large and three selectmen elected from wards. It is this fact which gives rise to the substantial question presented by this appeal.

Appellees argue that the City's charter authorized the City to adopt the October, 1985 change in the method of electing selectmen by ordinance rather than a charter change. (Motion to Affirm, pp. 5-8). They make this argument by relying on sound precedent that once the at-large method of election had been held unconstitutional, the City could not enforce the at-large method of election. (Motion to Affirm, pp. 7-8).

However, the appellees did not address the effect of their voluntary change in the method of election on the City's charter. And, the three-judge panel below did not address this issue. When the appellees in 1976, in response to Setwart v. Waller, supra, reverted to the 1947 charter method of election of three selectmen by wards and three selectmen, the appellees de facto amended the charter.[2]

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[2]This was a de facto change because the city did not formally amend its charter, and the change was not actually implemented by a court. See McDaniel v. Sanchez, 452 U.S. 130, 141, 145-146); County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (D.D.C. 1983)(three-judge court).

The appellees state that the issue before this Court is what effect did the Stewart v. Waller, supra, decision have on McComb's private charter. However, appellants raised the issue in the Court below and in this Court as to what effect did the appellees' actions in changing the method of election, without formally amending the charter and without obtaining preclearance, in 1976 have on the city's charter. And, appellants raised the question of what effect did the October, 1985 change in method of election have on the 1976 de facto charter change. Neither the Court below, or the appellees, have addressed these issues.

The appellees contend that the method of adopting the five ward plan by ordinance was precleared by the United States Attorney General. (Motion to Affirm, pp. 9-11). Appellees rely on the fact that the Attorney General, in a request for additional information, requested that the appellees provide "evidence of the City's authority from the state to avoid this proivision," (of complying with Section 21-17-9, Miss. Code Ann. (1972). (Motion to Affirm, p.10). The appellees, as stated in their Motion to Affirm, p. 4, in response to the request for additional information sent the United States Attorney General two opinions of the Mississippi Attorney General that the city's charter did not have to

be amended in October, 1985 because the charter, excised of the at-large election clause, provided that the city may elect six selectmen, and divide the city into not less than three wards. (Motion to Affirm, pp. 2, 4) (emphasis added). The Mississippi Attorney General interpreted the effects of the city's action in response to Stewart v. Waller, supra, the same way that the city is interpreting the decision. That is, the State Attorney General construed the city's response as being a Court-Ordered response in 1976, and that the city needed only to excise the unconstitutional at-large language from their charter in order to have an effective charter. (Exhibits G-11 and G-12). However, the appellants

contended (and still contend) that when the city reverted to the 1947 charter method of election it de facto amended the charter. This de facto charter amendment took place in 1976. From 1976 until 1985, the city's charter provided that there shall be six selectmen, three elected from wards and three elected at-large. When the city in October, 1985, by ordinance, changed the method of election of selectmen to five by ward and one at-large, it in fact amended the de facto amended charter of 1976. This voting change was never submitted to the Attorney General for proper Section 5 scrutiny.[2] As this

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[2]The appellees admit that the voting change argued by appellants was never submitted for Section 5 scrutiny. (Motion to Affirm, p. 11).

Court has recognized:

> More recently we stated: 'While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change; the purpose of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him. (citations omitted).

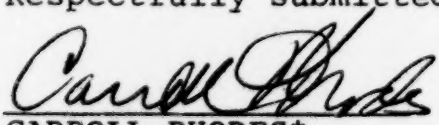
McCain v. Lybrand, ___ U.S.___, 104 S. Ct. 1046 (1984).

Contrary to appellees assertions, the question presented on this appeal is substantial. This question affects every jurisduction covered by the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c.

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction, and set a briefing schedule and argument before the Court.

Respectfully submitted,



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